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COURT OF CRIMINAL APPEALS
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Nos. PD-0108-20 & PD-109-20
IN THE COURT OF CRIMINAL APPEALS OF TEXAS

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COURT OF CRIMINAL APPEALS
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ON REVIEW FROM THE COURT OF APPEALS FOR
THE NINTH DISTRICT OF TEXAS AT BEAUMONT
Nos. 09-18-00218-CR & 09-18-006-00219-CR

BRADLEY JACOB SHUMWAY,

V.

THE STATE OF TEXAS

Arising from: **Cause Nos. 17-10-12127 & 17-12-15229**
IN THE DISTRICT COURT FOR THE
435TH JUDICIAL DISTRICT, MONTGOMERY COUNTY, TEXAS

STATE'S BRIEF ON DISCRETIONARY REVIEW

BRETT W. LIGON
District Attorney
Montgomery County, Texas

BRITTANY HANSFORD
NANCY HEBERT
Assistant District Attorneys
Montgomery County, Texas

WILLIAM J. DELMORE III
Assistant District Attorney
Montgomery County, Texas
T.B.C. No. 05732400
207 W. Phillips, Second Floor
Conroe, Texas 77301
936-539-7800
E-mail: bill.delmore@mctx.org

IDENTITY OF PARTIES AND COUNSEL

District Attorney:	**BRETT W. LIGON** District Attorney Montgomery County, Texas
Counsel for the State in the trial court:	**BRITTANY HANSFORD** **NANCY HEBERT** Assistant District Attorneys Montgomery County, Texas
Counsel for the State in the appellate courts:	**WILLIAM J. DELMORE III** Assistant District Attorney Montgomery County, Texas 207 W. Phillips, Second Floor Conroe, Texas 77301
Appellant:	**BRADLEY JACOB SHUMWAY** Spring, Texas
Counsel for the appellant in the trial court:	**LAWRENCE MCCOTTER** Conroe, Texas
Counsel for the appellant in the court of appeals:	**RONALD VOYLES, II** Conroe, Texas
	PAUL MATTHEW BROWN Conroe, Texas
Counsel for the appellant in this Court:	**RICHARD MARTIN P. CANLAS** Attorney at Law 300 W. Davis, Suite 400 Conroe, Texas 77301

TABLE OF CONTENTS

INDEX OF AUTHORITIES

Cases

Rules

Treatises

TO THE HONORABLE JUDGES OF THE COURT OF CRIMINAL APPEALS:

STATEMENT OF THE CASE

A grand jury returned two indictments charging the appellant with the commission of the offenses of aggravated sexual assault of a child under six years of age and indecency with a child (C.R. I-30, C.R. II-8). After the appellant entered pleas of not guilty, a jury found him guilty of indecency with a child in each case, and assessed his punishment in each case at imprisonment for twenty years and payment of a $5000 fine (C.R. I-118, C.R. II-78). The trial court ordered that the sentences be served consecutively (5 R.R. 158).

The appellant gave notice of appeal, and the Court of Appeals for the Ninth District of Texas affirmed the judgment of conviction in an unpublished memorandum opinion. *See Shumway v. State*, No. 09-18-00218-CR, 2020 WL 86780 (Tex. App.—Beaumont Jan. 8, 2020, pet. granted) (mem. op., not designated for publication). This Court then granted the appellant's petition for discretionary review without specifying a particular issue to be resolved.

ISSUES PRESENTED

The appellant posed four questions for this Court's determination in his petition for discretionary review:

> (1) Does the corpus delicti rule require evidence totally independent of a defendant's extrajudicial confession showing that the "essential nature" of the charged crime was committed by someone?

(2) Can independent evidence as to time, motive, opportunity, state of mind of the defendant, and/or contextual background information satisfy the corpus delicti rule in an indecency with child charge when there is zero evidence of sexual contact?

(3) Is the evidence legally sufficient to support convictions for indecency with a child when the independent evidence does not tend to establish sexual contact?

(4) Did the Ninth Court of Appeals improperly circumvent the Court of Criminal Appeals 2015 ruling on corpus delicti doctrine in *Miller v. State*, 457 S.W.3d 919 (Tex. Crim. App. 2015), which expressly declined to use a trustworthiness standard regarding the legal sufficiency of confessions?

Petition for Discretionary Review at p. iii–iv.

STATEMENT OF FACTS

Shortly after their 1994 marriage in Utah, the appellant admitted to his spouse, C.S., that he had placed his penis on the mouth and the vagina of Annika, an eight-to-fourteen-month-old infant whom C.S. was babysitting (5 R.R. 22, 24–27). Because the infant was unable to speak, and the appellant and C.S. chose to "work on forgiveness and atonement" with church officials (5 R.R. 32–34), no criminal prosecution ensued.

C.S. first testified in a courtroom about the appellant's confession of his crimes against infant Annika after the appellant was convicted of virtually identical crimes committed against an infant in Montgomery County, Texas, in 2016. This time, the appellant told both C.S. and a volunteer bishop of his church that he took

a seventeen-month-old infant into his bedroom and touched her genitals with his hand, his mouth and his penis (3 R.R. 43, 58).

In September of 2016, the appellant visited Thad Jenks, a volunteer bishop in the appellant's local ward of the Church of Jesus Christ of Latter Day Saints, and told Jenks that while the appellant and his wife were watching the children of family friends, he took his friends' young daughter into his bedroom, pulled down the child's diaper, and touched her in the "genital region" with his hands, tongue and penis (3 R.R. 43).

Later that month, the appellant told C.S. that he had talked to the bishop and needed to talk to her about something that happened while they were watching their friends' children (3 R.R. 58). The appellant said to C.S., "I'm just going to put it out there, that while they were here I touched [K.J.'s] genitals with my hand, my mouth, and my penis" (3 R.R. 58).

C.S. testified that K.J. was the daughter of good friends of theirs, and that they had cared for the couple's two children on several occasions (3 R.R. 54–55). She and the appellant cared for both of their friends' children during the couple's anniversary trip in early August of 2016 (3 R.R. 57).

The appellant explained to C.S. that while she was outside on the back patio talking to their daughter, he took K.J. into their master bedroom and placed her on the bed, leaving the door open (3 R.R. 59). The appellant initially said that he began

touching the child because he was "curious whether it would give him an erection" (3 R.R. 60). At one point he told C.S. that he stopped molesting the infant "when he was using his mouth" because he was "interrupted by this foul smell of the diaper" (3 R.R. 60). He then told C.S. that he was "using his hand a little bit later" when he "realized that he was doing something very wrong, and he kind of woke up to the reality that it could get him in a lot of trouble . . . so he stopped and kind of woke up" (3 R.R. 60).

The appellant provided C.S. with various reasons for his conduct. He told her at one point that he was "very angry and neglected," both "sexually neglected" and "emotionally neglected when [C.S.] went to lunch with [her] friends" and unfairly placed responsibility on the appellant for watching the children (3 R.R. 62–63). At another point he told C.S. that she was "irresponsible to not put the shorts back on [K.J.] after changing her diaper," and indicated that his conduct had "something to do with" K.J. "walking around in a diaper instead of with shorts on" (3 R.R. 62–63).

C.S. was able to corroborate many aspects of the appellant's admissions with her own recollections of the weekend. She remembered leaving the house to have breakfast with her friend Tracey and two other church members at a restaurant called Another Broken Egg (3 R.R. 64). She remembered that K.J.'s shorts were too small and that she left them off after changing K.J.'s diaper, allowing K.J. to walk around in her diaper (3 R.R. 62–3, 65). She remembered being outside in the back yard with

her daughter for fifteen to twenty minutes around midday, having a "fairly important discussion" while K.J. was inside with the appellant (3 R.R. 66). And she remembered that afterwards the appellant "was fasting a lot and somewhat withdrawn . . . a little more than usual," and she remembered him leaving to attend a meeting with their bishop (3 R.R. 67).

Church bishops informed K.J.'s parents of the appellant's admissions, and her parents arranged for a physical examination by a sexual assault nurse examiner, who found no evidence of injury (3 R.R. 87, 93–94, 105, 109). K.J.'s mother testified that when K.J. was one-and-a-half years old, K.J. knew just twenty to thirty words and did not speak in sentences (3 R.R. 116). K.J. never spoke of her sexual molestation by the appellant (3 R.R. 116).

SUMMARY OF THE STATE'S ARGUMENT

For over a century, this Court has consistently held that a well-corroborated confession can be used to aid in establishing the corpus delicti of a crime. The leading case for that proposition, *Kugadt v. State*, 44 S.W. 989 (Tex. Crim. App. 1898), has been cited dozens of times without ever having been overruled or questioned. *Kugadt* represents the common law of Texas. While this Court has stated in recent cases that evidence independent of a confession must establish the "essential nature" of an offense, those cases addressed different issues and were not

intended to overrule, *sub silentio*, the established line of cases represented by *Kugadt* and its progeny.

The court of appeals also correctly identified the standard for reviewing the sufficiency of proof of the corpus delicti, as set out *Rocha v. State*, 16 S.W.3d 1, 4–5 (Tex. Crim. App. 2000): "All that is required is that there be some evidence which renders the commission of the offense more probable than it would be without the evidence." The appellant's inculpatory statements to his wife were extensively corroborated by evidence of motive, opportunity and consciousness of guilt. And the trial court could properly consider the appellant's parallel admissions to his religious advisor in assessing the reliability of the detailed confession he provided to his spouse. Considering the independent evidence in conjunction with the appellant's detailed descriptions of sexual contact with the victim, the court of appeals did not err in determining that the proof of the corpus delicti was sufficient to support the appellant's conviction.

Alternatively, this Court should follow the example of the Supreme Court of Kansas in *State v. Dern*, 362 P.3d 566 (Kan. 2015), and recognize an exception to the corpus delicti rule for cases in which a defendant has provided a trustworthy confession of having engaged in unlawful sexual conduct with a non-verbal victim incapable of outcry. The corpus delicti rule disproportionately operates to the benefit of defendants who sexually abuse infants, and this Court previously expressed its

concern that "when the case involves 'the most vulnerable victims, such as infants, young children, and the mentally infirm,' the corpus delicti rule can be used to block convictions for real crimes that resulted in no verifiable injury." *Miller*, 457 S.W.3d at 927 (quoting *Colorado v. LaRosa*, 293 P.3d 567, 574 (Colo. 2013)). The appellant has repeatedly targeted non-verbal infants for sexual abuse. His well-corroborated, multiple confessions to non-law enforcement individuals are eminently trustworthy, and his acquittal would only serve to encourage the continuing victimization of the most vulnerable members of our society.

ARGUMENT AND AUTHORITIES

a. This Court has long held that a confession may be used to aid in establishing the corpus delicti of a crime.

The court of appeals correctly stated that a defendant's extrajudicial confession may be used to aid in establishing the corpus delicti of a crime, citing *Salazar v. State*, 86 S.W.3d 640, 645 (Tex. Crim. App. 2002), and *Turner v. State*, 877 S.W.2d 513, 515 (Tex. App.—Fort Worth 1994, no pet.). *See Shumway*, 2020 WL 86780, at *5. The appellant disagrees, arguing in his brief that a defendant's confession cannot contribute to the proof of the corpus delicti, and that cases like *Salazar and Turner* are inconsistent with this Court's more recent decisions in *Miller v. State*, 457 S.W.3d 919 (Tex. Crim. App. 2015), and *Hacker v. State*, 389 S.W.3d 860 (Tex. Crim. App. 2013). *See* Appellant's Brief at p. 22. But this Court has repeatedly held over a span of a hundred years—in a line of cases neither questioned nor overruled—

that a defendant's confession *can* be considered in determining the adequacy of proof of the corpus delicti of the crime. And if this Court is going to continue to enforce the common law corpus delicti rule—as other courts abandon and overrule it—it should adhere to its long-standing, historic formulation of the rule, rather than raise new roadblocks to prosecution of crimes committed against infants incapable of outcry.

In *Kugadt v. State*, 44 S.W. 989, 995–96 (Tex. Crim. App. 1898), the defendant confessed to the murder of his wife, but argued on appeal that there was no independent proof that she did "come to her death by some criminal means or agency." This Court cited *The American and English Encyclopedia of Law* in support of its holding that a defendant's extra-judicial confession may be used to aid in the establishment of the corpus delicti of the offense:

> The general doctrine is that extrajudicial confessions, standing alone, are not sufficient proof of the corpus delicti; and some of the cases hold that the corpus delicti must be proved independently of confessions. But we do not understand such to be the better doctrine. In other words, in the establishment of the corpus delicti, the confessions are not to be excluded, but are to be taken in connection with the other facts and circumstances in evidence. *See* note 3 to case of *State v. Williams*, [52 N.C. 446 (1860)] reported in 78 Am. Dec. p. 254. And this rule is recognized in this State. *See Jackson v. State*, 29 Tex. App. 458, 16 S.W. 247 [(1891)]. Said case quotes with approval an excerpt taken from 4 Am. & Eng. Enc. Law, p. 309, as follows: "A confession is sufficient, if there be such extrinsic corroborative circumstances as will, taken in connection with the confession, produce conviction of the defendant's guilt in the minds of a jury beyond a reasonable doubt." "Such suppletory evidence need not be conclusive in its character. When a confession is made, and the circumstances therein related

> correspond in some points with those proven to have existed, this may be evidence sufficient to satisfy a jury in rendering a verdict asserting the guilt of the accused. 'Full proof of the body of the crime, the corpus delicti, independently of the confessions, is not required by any of the cases; and in many of them slight corroborating facts were held sufficient.'" 3 Am. & Eng. Enc. Law, p. 447. We take it that there can be no question that the prosecution is permitted to prove by circumstantial evidence the corpus delicti, and in aid thereto use confession of the appellant.

Kugadt, 44 S.W. at 996. The Court ultimately found that the victim's remains and the defendant's false story of her death by accident constituted adequate proof of the corpus delicti of murder.

Kugadt became this Court's leading case on the sufficiency of evidence to establish corpus delicti, and this Court has routinely cited it as authority for the use of a confession to aid in establishing the corpus delicti of a crime. For instance, in *Harris v. State*, 144 S.W. 232, 239 (Tex. Crim. App. 1912), a defendant argued that there was no proof—other than his written confession—that he committed incest with his sister. This Court quoted extensively from *Kugadt* in support of its holding that it was "firmly established by the decisions of this Court that the confession may be used to aid the proof of the corpus delicti, and if all of it together is sufficient to satisfy a jury of the truth of the charge beyond a reasonable doubt, the conviction must be sustained." *Id.*

In *Ingram v. State*, 182 S.W. 290 (Tex. Crim. App. 1915), the defendant argued in this Court that the circumstances of a victim's shooting death were consistent with

suicide and that the State therefore failed to prove the corpus delicti of murder. While the issue was whether the accomplice testimony could be used to establish the corpus delicti, this Court cited *Kugadt* for the proposition that a confession could be considered in establishing the corpus delicti. *Id*. at 572. And on rehearing, the Court noted that the holding in *Kugadt* was consistent with the rule stated in both Branch's treatise on criminal law and Wharton's treatise on criminal evidence:

> Mr. Branch, in his work on Criminal Law, § 235, says the confession may be used to aid the proof of the corpus delicti, citing *Kugadt v. State*, 38 Tex. Cr. R. 694, 44 S.W. 989; *Jackson v. State*, 29 Tex. App. 464, 16 S.W. 247 [numerous additional citations omitted].
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> Wharton's Criminal Evidence (10th Ed.) § 634, states the rule to be:
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> > "As to the corpus delicti, the evidence need not be direct, but it may be established by circumstances corroborating the confession, and the confession itself may be considered together with all the other evidence to establish the fact that a crime was committed"—citing many authorities.

Id. at 584–85 (op. on rehearing).

In *Davis v. State*, 275 S.W. 1060 (Tex. Crim. App. 1925), a sheriff was charged with taking a $100 bribe from a moonshiner, and his conviction was upheld despite the complete absence of any evidence—other than the sheriff's confession—to show that a bribe was actually paid. On original submission, this Court again cited *Kugadt* in support of its holding that the confession could be considered in assessing the sufficiency of proof of the corpus delicti of the crime:

> To meet the requirements of the law touching the corroboration of an extrajudicial confession, it is not essential that the corroborating facts of themselves be conclusive. A comprehensive and accurate statement of the law is found in the opinion of Presiding Judge Hurt of this court in the case of *Kugadt v. State*, 38 Tex. Cr. R. 692, 44 S.W. 989. The corpus delicti may be established by circumstantial evidence. In the present case, the confession definitely shows an agreement to accept the bribe, and that the bribe money was received by the appellant.

Id. at 1063. And on rehearing, the Court stated it would "adhere to the rule laid down in *Kugadt v. State*," in holding that the corpus delicti of bribery was established by the sheriff's well-corroborated confession:

> On the sufficiency of proof of the corpus delicti, appellant made a full and complete admission of the fact that for many months and possibly several years he was permitting certain parties to carry on the illicit traffic in liquor while he was sheriff. That said parties were engaged in said traffic was proven, also that this fact was directly brought to appellant's attention, and that he practically refused to act in any official way to punish the offenders or prevent the traffic, but on the contrary tried to intimidate and coerce the private citizens who were trying to stop such traffic, appears in the record. We adhere to the rule laid down in *Kugadt v. State*, 38 Tex. Cr. R. 692, 44 S. W. 989. J.C. Pruitt was one of the parties named in the indictment as entitled to appellant's protection under the alleged agreement. The record amply shows appellant to have given him such protection.

Id. at 1064.

In *Pretre v. State*, 17 S.W.2d 42, 45 (1929), the defendant's confession was the only proof that a building fire was intentionally set. On original submission, this Court held that the corroboration of the confession was sufficient to establish the corpus delicti of arson:

> The most serious question in the case to our mind is the sufficiency of the evidence. It is the well-settled rule that an extrajudicial confession alone is not sufficient to establish the corpus delicti. Underhill's Criminal Evidence (3d Ed.) § 36; *Duncan v. State*, 109 Tex. Cr. R. 668, 7 S.W.(2d) 79 [(Tex. Crim. App. 1928)], and authorities there collated. But it is further held that the confession may be used to aid the proof of corpus delicti. *Jackson v. State*, 29 Tex. App. 464, 16 S.W. 247, Branch's P. C. p. 1049, and authorities there shown.

Id. at 44. And on rehearing, the Court cited *Kugadt* for the proposition that "[w]hen a confession is made, and the circumstances therein related correspond in material points with those proven to have existed aliunde the confession, this may be evidence sufficient to satisfy a jury in rendering a verdict of guilty." *Id*. at 45.

In *Black v. State*, 128 S.W.2d 406, 413 (Tex. Crim. App. 1939), the defendant argued in this Court that there was no proof—other than his confession—that a deceased child was pushed from a cliff and did not accidently fall to his death. This Court held on rehearing that under *Kugadt*, the "leading case" on the issue, the defendant's well-corroborated confession could be used in aid of establishing the corpus delicti of murder:

> Complaint is again made on the ground that the body of this crime is only established by means of the confession alone, and therefore that the State has failed to make out a proper case herein. The *Kugadt* case, *Kugadt v. State*, 38 Tex. Cr. R. 681, 44 S.W. 989, is the leading case on this proposition, and Judge Hurt went into this matter exhaustively, and therein lays down the doctrine that although an extrajudicial confession alone is not sufficient to establish the corpus delicti, such confession can be used in aid of its establishment, and if there be extrinsic corroborative circumstances as will, taken in connection with the confession, produce conviction in the minds of the jury, such will be

> sufficient; and such extrinsic evidence need not be conclusive in its character. Also see *Jackson v. State*, 29 Tex. App. 458, 16 S.W. 247.

Id. at 413. The Court concluded that the confession was adequately corroborated by evidence of the defendant's opportunity, motive, and his suspicious conduct after the child's death, and that the evidence of the corpus delicti was sufficient to sustain the conviction. *Id*.

The Court subsequently cited *Kugadt* in *Watson v. State*, 227 S.W.2d 559, 562 (Tex. Crim. App. 1950), and in *Carr v. State*, 255 S.W.2d 870, 871 (Tex. Crim. App. 1953), for the proposition that, "In establishing the corpus delicti, the confession may be used in connection with the other facts and circumstances, that is, the confession may be used to aid the proof of the corpus delicti." In *Hignett v. State*, 341 S.W. 166, 169 (Tex. Crim. App. 1960), the Court similarly cited *Kugadt* for the proposition that the "the confession may be used in connection with other facts to establish the corpus delicti." And in *Robinson v. State*, 352 S.W.2d 103, 105 (Tex. Crim. App. 1961), the Court repeated with approval the *Kugadt* conclusion that, "We take it there can be no question that the prosecution is permitted to prove by circumstantial evidence the corpus delicti, and in aid thereto use [the] confession of the appellant."

In the well-known case of *Self v. State*, 513 S.W.2d 832, 835 (Tex. Crim. App. 1974), the bodies of two young women were recovered from a bayou several months after they disappeared, and a pathologist was unable to determine the cause of their

deaths. The defendant argued that the corpus delicti of murder was not proven in the absence of proof that the death of the victim named in the indictment resulted from the criminal act of another. *Id*. at 835. This Court relied upon *Kugadt* and its progeny to hold that, "If there is some evidence corroborating the confession, the confession may be used to aid in the establishment of the corpus delicti." *Id*. The Court then reviewed the evidence corroborating the defendant's confession, and found that "[a]lthough the evidence independent of the extrajudicial written confession and oral statement was not sufficient by itself to prove the cause of death, by considering the independent evidence together with the appellant's statements [the Court] concluded that the evidence was sufficient to prove the death of Sharon Shaw was caused by the criminal act of another, and the second element of the corpus delicti was established." *Id.* at 837.

In *White v. State*, 591 S.W.2d 851, 863–64 (Tex. Crim. App. 1979), *overruled on other grounds, Bigby v. State*, 892 S.W.2d 864 (Tex. Crim. App. 1994), the Court cited cases more recently decided than *Kugadt*, but still concluded that "if there is some evidence corroborating a confession, the confession may be used in the establishment of corpus delicti." And, therefore, the "threshold question to be resolved" is "whether there was sufficient corroborative evidence which tended to support the content of the confession." *Id*. at 864.

White was discussed in the Court's opinion in *Wooldridge v. State*, 653 S.W.2d 811, 816–17 (Tex. Crim. App. 1983), which includes the same holding regarding the use of a confession to aid in establishing the corpus delicti of an offense:

> It is well settled that if there is some evidence corroborative of a confession, the confession may be used to establish the "corpus delicti." *White v. State*, 591 S.W.2d 851 (Tex. Cr. App. 1979); *Thomas v. State*, 108 Tex. Cr. R. 131, 299 S.W. 408 (Tex. Cr. App. 1927). In *White*, *supra*, the appellant admitted he participated in murders which occurred during the course of robbery. No independent evidence established a robbery had been committed. The Court held the confession was sufficiently corroborated by circumstances which coincided with details of the confession.
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> In *Thomas*, *supra*, it was stated:
>
> > "A confession is sufficient, if there be such extrinsic corroborative circumstances as will, taken in connection with the confession, produce conviction of the defendant's guilt in the minds of the jury beyond a reasonable doubt. Such suppletory evidence need not be conclusive in its character. When a confession is made, and the circumstances therein related correspond in some points with those proven to have existed, this may be evidence sufficient to satisfy a jury in rendering a verdict asserting the guilt of the accused. Full proof of the body of the crime, the corpus delicti, independently of the confession is not required by any of the cases . . . [citations omitted]."

During the 1980s and 1990s, Texas intermediate appellate courts continued to cite *Kugadt* as authority for the use of a corroborated confession to aid in establishing the corpus delicti of a crime. *See*, *e.g.*, *Jackson v. State*, No. 03-96-00726-CR, 1998 WL 20699, at *3 (Tex. App.—Austin Jan. 23, 1998, pet. ref'd) (mem. op., not designated for publication); *Hough v. State*, 929 S.W.2d 484, 487 (Tex. App.—

Texarkana 1996, pet. ref'd); *Douthit v. State*, 739 S.W.2d 94, 96 (Tex. App.—San Antonio 1987, no pet.). And this Court more recently stated in *Salazar*, 86 S.W.3d at 644–45 (emphasis supplied), that "it satisfies the corpus delicti rule if some evidence exists outside of the extra-judicial confession which, *considered alone or in connection with the confession*, shows that the crime actually occurred."

This has now been the law for well over one-hundred years. *Kugadt* has never been overruled or even questioned as valid authority. It represents the common law of the State of Texas.

The appellant argues that the *Kugadt* rule is inconsistent with the approach taken in two of the Court's most recent cases involving corpus delicti issues, *Miller*, 457 S.W.3d at 924, and *Hacker*, 389 S.W.3d at 866, in which the Court has stated that the corpus delicti rule requires "evidence independent of a defendant's extrajudicial confession show[ing] that the 'essential nature' of the charged crime was committed by someone." But neither *Miller* nor *Hacker* required examination of the *Kugadt* rule, and both cases actually served to relax, rather than stiffen, the Texas corpus delicti rule. In *Miller*, the Court recognized a "closely related crimes" exception to the Texas common law corpus delicti requirement; and *Hacker* only noted in passing that an uncorroborated confession may be sufficient to support a probation revocation.

The "essential nature" phrase can be traced back to *Salazar,* in which the Court held that the corpus delicti rule did not require independent proof of the *exact manner* in which the defendant admitted to sexually abusing a child. *Salazar*, 86 S.W.3d at 645–46. *Salazar* was not concerned with the issue of whether a corroborated confession could aid in establishing the corpus delicti. And as previously noted, the Court in *Salazar* quoted with approval the *Kugadt* rule that "it satisfies the corpus delicti rule if some evidence exists outside of the extra-judicial confession which, *considered alone or in connection with the confession*, shows that the crime actually occurred." *Id*. at 645 (emphasis supplied).

Dicta in *Hacker* and *Miller* should not be construed as having overruled, *sub silentio*, a line of cases that has stood, unbroken and unquestioned, for over one-hundred years. *Kugadt* remains the established common law of Texas, and the court of appeals did not err in this case by holding that "[i]f there is some evidence corroborating the admission, the admission may be used to aid in the establishment of the corpus delicti." *Shumway*, 2020 WL 86780 at *5. To any extent that the evidence other than the appellant's confession did not adequately establish an element of the offense, the court of appeals correctly relied upon the confession to supply the necessary proof of that element.

b. The court of appeals applied the correct standard and did not err in finding that proof of the corpus delicti was sufficient.

The court of appeals also applied the correct standard for assessing the sufficiency of the evidence establishing the corpus delicti: "all that is required is that there be some evidence which renders the commission of the offense more probable than it would be without the evidence." *Shumway*, 2020 WL 86780 at *5. Stated another way, "So long as there is independent evidence to render the corpus delicti of a crime 'more probable than it would be without the evidence,' the essential purposes of the doctrine have been satisfied." *Id.* (quoting *Gribble v. State*, 808 S.W.2d 65, 71–72 (Tex. Crim. App. 1990)).

It seems this Court first articulated the "more probable" standard in *Gribble,* in the context of determining whether the State adequately corroborated a defendant's confession with regard to the underlying felony offense in a capital murder prosecution. The Court has since applied it to the proof of corpus delicti generally:

> The corpus delicti rule is a rule of evidentiary sufficiency that can be summarized as follows: an extrajudicial confession of wrongdoing, standing alone, is not enough to support a conviction; there must exist other evidence showing that a crime has in fact been committed. *Williams v. State*, 958 S.W.2d 186, 190 (Tex. Crim. App. 1997). This other evidence is commonly referred to as the "corpus delicti." *Id*. This other evidence need not be sufficient by itself to prove the offense: "all that is required is that there be some evidence which renders the commission of the offense more probable than it would be without the evidence." *Id*. (quoting *Chambers v. State*, 866 S.W.2d 9, 15–16 (Tex. Crim. App. 1993), *cert. denied*, 511 U.S. 1100, 114 S.Ct. 1871, 128

> L.Ed.2d 491 (1994)). We have held that, in a capital murder case, the corpus delicti requirement extends to both the murder and the underlying offense. *Williams*, 958 S.W.2d at 190 . . .

Rocha v. State, 16 S.W.3d 1, 4–5 (Tex. Crim. App. 2000). And the courts of appeals have applied that "more probable" standard in numerous cases involving offenses other than capital murder. *See*, *e.g.*, *Rajsakha v. State*, No. 05-16-00489-CR, 2017 WL 2628248, at *2 (Tex. App.—Dallas June 19, 2017, no pet.) (mem. op., not designated for publication) (driving while intoxicated); *Harris v. State*, 521 S.W.3d 426, 428 (Tex. App.—Amarillo 2017, pet. ref'd) (felon in possession of firearm); *Parrish v. State*, 485 S.W.3d 86, 90 (Tex. App.—Houston [14th Dist.] 2015, pet. ref'd) (improper student/educator relationship); *Baker v. State*, No. 10-10-00049-CR, 2011 WL 2242571, at *2 (Tex. App.—Waco June 8, 2011, pet. ref'd) (mem. op., not designated for publication) (murder); *Gibson v. State*, No. 05-02-01771-CR, 2004 WL 772414, at *3 (Tex. App.—Dallas Apr. 13, 2004, pet. ref'd) (indecency with child).

In this case, there was more than sufficient evidence to render "the corpus delicti more probable than it would be without the evidence." *See Rocha*, 16 S.W.3d 4–5. Numerous aspects of the appellant's detailed and credible confession to C.S. were corroborated by C.S.'s recollections and testimony and other evidence:

- the appellant's admission that he touched K.J.'s genitals while they were watching the children of family friends (3 R.R. 58) was corroborated by C.S.'s recollection of caring for K.J. and K.J.'s

brother during the children's parents' weekend anniversary trip in early August of 2016 (3 R.R. 57);

- the appellant's explanation that he molested K.J. because he was feeling "emotionally neglected when [C.S.] went to lunch with [her] friends," leaving him to care for the children (2 R.R. 62), was corroborated by C.S.'s recollection of leaving the house to have lunch at Another Broken Egg with members of her church committee (3 R.R. 64);

- the appellant's complaint that C.S. was "irresponsible" for not putting K.J.'s shorts back on the child after changing K.J.'s diaper (3 R.R. 62–63) was corroborated by C.S.'s recollection that she let K.J. walk around in a diaper because her shorts were too small (3 R.R. 62–63, 65);

- the appellant's admission that he molested K.J. while C.S. was outside on the back patio talking to her daughter (3 R.R. 59) was corroborated by C.S.'s recollection of the "fairly important" conversation she shared with her daughter, outside at midday, while K.J. was inside with the appellant (3 R.R. 66);

- the appellant's emotional response to his misconduct was corroborated by C.S.'s recollection that he fasted a lot and was more withdrawn after the weekend they cared for K.J. (3 R.R. 67);

- the appellant's explanation that he had talked to his bishop and needed to talk to C.S. about what had occurred while they were watching K.J. and her brother (3 R.R. 58) was corroborated by C.S.'s recollection of the appellant leaving to meet with the bishop (3 R.R. 67); and

- most significantly, the appellant's admission to C.S. that he touched K.J. with his finger, his mouth and his penis after taking the child into their master bedroom (3 R.R. 58–59) was corroborated by the appellant's matching admission to his church bishop, Thad Jenks, that he took the year-old daughter of family friends into his bedroom and touched the child's genital region with his hands, his tongue and his penis (3 R.R. 43).

This Court does not seem to have addressed the issue of whether independent proof of the corpus delicti of an offense may include a defendant's voluntary statement made to a different person on a different occasion. Several cases from other jurisdictions have held that a second confession cannot serve as proof of the corpus delicti after admission of a defendant's initial confession. *See State v. Aten*, 900 P.2d 579, 585 n.24 (Wash. App. 1995), *aff'd*, 927 P.2d 210 (Wash. 1996), and cases cited therein. But a Kansas appellate court has held that voluntary, inculpatory statements to non-law enforcement personnel may serve as some incremental corroboration of a confession subsequently obtained by police:

> Nevertheless, we believe that some weight can be given to the fact that McGill confessed three separate times to non-law enforcement individuals, providing consistent details about how he molested his children, before law enforcement officers became involved in his case. In discussing the corpus delicti rule, the United States Supreme Court noted that one of the concerns justifying the rule is that the reliability of a confession "may be suspect if it is extracted from one who is under the pressure of a police investigation." *Smith* [*v. United States*], 348 U.S. [147] at 153, 75 S.Ct. 194 [(1954)]. McGill cannot claim that he was under the pressure of a police investigation when he initially confessed to molesting his children. The fact that McGill confessed three separate times to non-law enforcement individuals before law enforcement officers became involved in his case is a factor that bolsters the reliability and trustworthiness of McGill's admissions.

State v. McGill, 328 P.3d 554, 561 (Kan. App. 2014).

The fact that the appellant's guilty conscience led him to visit his bishop and admit that he violated an infant left in his care made it at least a bit more likely that he actually committed the offenses he later confessed to his spouse. And the

consistency between his admissions to the bishop and to his wife also contributed to the likelihood that he was telling the truth to both individuals.

The appellant freely and voluntarily confessed his guilt—on multiple occasions—on account of his guilty conscience and his religious upbringing; no persuasion or coercion was used to prompt his confessions. His multiple confessions were credible and consistent, and they were corroborated in *many* respects by the independent recollections of his wife. The evidence other than the appellant's well-corroborated confession to his wife made it "more probable" that he actually committed the offense of indecency with a child, *see Rocha*, 16 S.W.3d at 3–4, and the court of appeals correctly found that proof of the corpus delicti was sufficient.

c. Alternatively, this Court should recognize an exception to the corpus delicti rule for cases involving trustworthy admissions of sexual offenses committed against victims incapable of outcry.

In the alternative, this Court should follow the example of the Supreme Court of Kansas in *State v. Dern*, 362 P.3d 566 (Kan. 2015), and recognize an exception to the corpus delicti rule for those cases in which a defendant provides a trustworthy confession of having engaged in unlawful sexual conduct with a non-verbal victim incapable of outcry.

The "corpus delicti rule is a common law, judicially created, doctrine . . . ." *Carrizales v. State*, 414 S.W.3d 737, 740 (Tex. Crim. App. 2013). Texas courts are therefore free to recognize exceptions to the rule when an exception is warranted.

See, e.g., Miller, 457 S.W.3d at 927 (recognizing the "closely connected crime exception" to the corpus delicti rule). And an exception is plainly warranted when the rule serves no purpose other than to frustrate the administration of justice and allow the guilty to prey upon defenseless infants and handicapped adults without fear of consequences.[1]

First, concern that a defendant has invented a crime in order to escape oppressive police interrogation is completely absent in a case like this, in which there was no police interrogation at all. The appellant's volunteered confessions were highly trustworthy because they resulted from his religious convictions and his guilty conscience—rather than any persuasion utilized by police investigators—and because they were highly corroborated by the independent recollections of his spouse. When a rule operates to prevent prosecution for a grievous crime, without serving any countervailing purpose, it is time for the rule to be adjusted. *See*, *e.g.*, *State v. Mauchley*, 67 P.3d 477, 487–88 (Utah 2003) (holding that "additional

[1] The State would welcome and applaud the complete abrogation of the common-law corpus delicti rule in Texas, but the Court considered and denied a request to abolish the rule just five years ago in *Miller*, 457 S.W.3d at 926–27. The State recognizes that principles of stare decisis render it unlikely that the Court would reconsider its ruling on the continued need for the corpus delicti rule so soon after *Miller* was decided. But an exception to the rule of stare decisis may be made if the Court should "conclude that the precedent in question 'was poorly reasoned or is unworkable.'" *Garcia v. State*, No. PD-0035-18, 2019 WL 6167834, at *4 (Tex. Crim. App. Nov. 20, 2019) (not yet published) (quoting *Paulson v. State*, 28 S.W.3d 570, 571 (Tex. Crim. App. 2000)).

procedural and constitutional safeguards that have been recognized since the rule's inception make the [corpus delicti] rule unnecessary").

Second, the common-law corpus delicti rule conflicts with this Court's holding that "the *Jackson v. Virginia*[2] legal-sufficiency standard is the *only* standard that a reviewing court should apply in determining whether the evidence is sufficient to support each element of a criminal offense that the State is required to prove beyond a reasonable doubt." *Brooks v. State*, 323 S.W.3d 893, 895 (Tex. Crim. App. 2010) (emphasis supplied).

The State's evidence in this case unquestionably satisfied the evidentiary sufficiency standard set out in *Jackson*. And in a case in which *any* rational juror would have found the essential elements of the crime beyond a reasonable doubt, there is no reason to reverse the conviction because the State relied heavily upon the defendant's confession to prove that specific conduct occurred. *See and cf. Geesa v. State*, 820 S.W.2d 154 (Tex. Crim. App. 1991) (holding that the same standard of proof should be used in assessing the sufficiency of either direct or circumstantial evidence, and that the "exclusion of outstanding reasonable hypothesis" analysis should no longer be used in cases relying upon circumstantial evidence). The *Jackson* standard provides adequate assurance that the appellant has not confessed the commission of an imaginary crime.

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[2] *See Jackson v. Virginia*, 443 U.S. 307 (1979).

And third, the traditional common-law corpus delicti rule encourages the victimization of non-verbal infants and handicapped adults who are incapable of outcry. In *People v. LaRosa*, 293 P.3d 567, 575 (Colo. 2013), the Supreme Court of Colorado recently abrogated the common-law rule, in part because it operated to encourage sexual violence against the most vulnerable members of society:

> We are troubled that the rule works to bar convictions in cases involving the most vulnerable victims, such as infants, young children, and the mentally infirm. We are also aware that the rule operates disproportionately in cases where no tangible injury results, such as in cases involving inappropriate sexual contact, or where criminal agency is difficult or impossible to prove, such as in cases involving infanticide or child abuse. Indeed, in Colorado, LaRosa's case is not the first of its type in which the rule has been invoked to bar conviction for sexual assault against a young child. *See Meredith* [*v. People*], 152 Colo. [69] at 72, 380 P.2d [227, 228 (1963)] (applying corpus delicti rule to reverse the conviction of a defendant who confessed to molesting a five-year-old boy); [*People v.*] *Robson*, 80 P.3d [912] at 913–14 [(Colo. App. 2003)] (applying corpus delicti rule to affirm the trial court's dismissal of charges against a defendant who confessed to sexually assaulting his infant daughter). Because the rule may operate to obstruct justice, we conclude that abandoning it will do more good than harm.

These same concerns led the Supreme Court of Kansas to carve out an exception to the common-law corpus delicti rule, permitting a trustworthy confession to establish the corpus delicti of a crime "when the nature and circumstances of that crime are such that it did not produce a tangible injury." *Dern*, 362 P.3d at 583. The Kansas court cited *LaRosa* in noting that the corpus delicti rule obstructed society's interest in prosecuting sex crimes committed against infants, which may leave no tangible evidence of injury:

> More pertinent to this case, applying the formal corpus delicti rule to crimes involving inappropriate sexual contact "seems especially troublesome" because the contact "often produces no tangible injury." *Mauchley*, 67 P.3d at 484–85. The difficulty is compounded when, as in this case, the young victims are unable to qualify as witnesses who could present evidence of the corpus delicti independent of the confession. *See* [*State v.*] *McGill*, 50 Kan.App.2d [208] at 236–37, 328 P.3d 554 [(Kan. App. 2016)] (discussing various jurisdictions' efforts to apply the rule to cases with no tangible injury) (Stegall, J., concurring).
>
> In discussing the harm caused by the formal rule, the Colorado Supreme Court, for example, held:
>
> > We are troubled that the rule works to bar convictions in cases involving the most vulnerable victims, such as infants, young children, and the mentally infirm . . . . *People v. LaRosa*, 2013 CO 2. ¶ 31, 293 P.3d 567.

Dern, 362 P.3d at 579.

Because of these concerns for non-verbal victims, the *Dern* court held that in cases in which the "nature and circumstances of [a] crime are such that it did not produce a tangible injury," it will henceforth recognize an alternative to independent proof of the corpus delicti: "[t]hat alternative route is a trustworthy confession or admission to crimes that do not naturally or obviously produce a tangible injury easily susceptible to physical proof." *Id.*

This Court has stated that its judges "share the concerns of the Colorado Supreme Court that, when the case involves 'the most vulnerable victims, such as infants, young children, and the mentally infirm,' the corpus delicti rule can be used to block convictions for real crimes that resulted in no verifiable injury." *Miller*, 457

S.W.3d at 927 (quoting *LaRosa*, 293 P.3d at 575). The Court therefore should likewise act to protect the vulnerable from those villains who would prey upon infants incapable of complaining of the sordid crimes committed against them.

The appellant's detailed, corroborated confessions to his bishop and his wife—motivated solely by his guilty conscience and unprompted by the inquiries of authorities—are as trustworthy as confessions get. And the punishment stage testimony shows that the appellant has *repeatedly* acted upon his predilection for sexual conduct with infants. To any extent that the outmoded common law might require his acquittal and thereby effectively encourage him to continue to victimize infants as uncomplaining sex objects, that law should be changed. Texas courts should recognize an exception permitting the use of a trustworthy confession to establish the corpus delicti in a case of sexual misconduct perpetrated against a victim incapable of outcry.

CONCLUSION AND PRAYER

The State respectfully requests that the judgments of the court of appeals and the district court be affirmed.

BRETT W. LIGON
District Attorney
Montgomery County, Texas

/s/ William J. Delmore III
WILLIAM J. DELMORE III
T.B.C. No. 05732400
Assistant District Attorney
Montgomery County, Texas
207 W. Phillips, Second Floor
Conroe, Texas 77301
936-539-7800
936-788-8395 (FAX)
E-mail: bill.delmore@mctx.org

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/s/ William J. Delmore III
WILLIAM J. DELMORE III
Assistant District Attorney
Montgomery County, Texas

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing instrument was served electronically upon counsel for the appellant and upon the office of the State Prosecuting Attorney on the date of the submission of the original to the Clerk of this Court.

/s/ William J. Delmore III
WILLIAM J. DELMORE III
Assistant District Attorney
Montgomery County, Texas

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William Delmore III
Bar No. 05732400
bill.delmore@mctx.org
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Associated Case Party: BRADLEYJACOBSSHUMWAY

Name	BarNumber	Email	TimestampSubmitted	Status
Richard Canlas		richard@attorneycanlas.com	9/23/2020 3:12:38 PM	SENT

Case Contacts

Name	BarNumber	Email	TimestampSubmitted	Status
Stacey Soule	24031632	information@spa.texas.gov	9/23/2020 3:12:38 PM	SENT